Filed 1/25/10 In re A.M. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re A.M., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. A.M., Defendant and Appellant.	E048235 (Super.Ct.No. RIJ117678) OPINION

APPEAL from the Superior Court of Riverside County. Charles J. Koosed, Judge. Affirmed with directions.

Carey D. Gorden, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Assistant Attorney General, and Kevin Vienna, Deputy Attorney General, for Plaintiff and Respondent.

On February 24, 2009, the Riverside County District Attorney's Office filed a petition alleging that minor A.M. came within the provisions of Welfare and Institutions Code section 602. The petition alleged that minor willfully and unlawfully (1) possessed a firearm under Penal Code section 12101, subdivision (a), a felony (count 1); possessed a firearm on the grounds of a public school without the permission of proper school authorities under Penal Code section 626.9, subdivision (b), a felony (count 2); and (3) brought and possessed a gun and sharpened screwdriver upon the grounds of a public school under Penal Code section 626.10, subdivision (a), a felony (count 3). The petition further alleged that count 1 was committed for the benefit of a criminal street gang under Penal Code section 186.22, subdivision (b).

On April 10, 2009, following a contested jurisdictional hearing, the juvenile court found true all three counts in the petition, but did not find true the gang allegation.

On April 23, 2009, following a dispositional hearing, minor was declared a ward of the court. The court found the total maximum period of confinement to be five years eight months, less credit for time served. The court placed minor on probation for such a period of time as deemed necessary by the staff and probation officer, with the understanding that minor follow all rules of probation and returned custody of minor to his parents.

On appeal, minor contends that (1) the juvenile court erred in setting a maximum term of confinement for minor; (2) one of the probation condition terms is unconstitutionally vague and overbroad; and (3) the juvenile court erred in failing to

exercise its discretion in determining whether the weapons possession "wobbler" offenses be deemed felonies or misdemeanors. The People concede. We agree with the parties and remand this case for the juvenile court to make modifications consistent with this opinion. In all other respects, the judgment is affirmed.

I

FACTUAL AND PROCEDURAL HISTORY

Trenton Hansen, the school principal in Rubidoux,

testified. On February 20, 2009, Hansen was advised by a student that there was reason to believe that minor was carrying a firearm on campus. Hansen summoned minor to his office where he searched minor's backpack. In the backpack, Hansen found a small canister of marijuana in a small pocket. Hansen also discovered, in a modified pocket of the backpack, a 25-caliber handgun and a homemade shank.

Deputy Sheriff Craig Hampton, an assigned school resource officer at the school, testified. Deputy Hampton stated that minor admitted that he had smoked some marijuana earlier while minor was in his PE class, and that he was a member of the West Side Rivas Lobos gang. Minor also admitted that the gun belonged to him and he had brought it to school to defend himself against the "Guzmans."[1] Minor stated that he had made the shank and kept it in his backpack for self-defense for about a year and a half. The officer then took minor into custody.

[1] The Guzmans are notorious gang members and the family is known to all gang members in the Rubidoux area.

II

ANALYSIS

A. Maximum Term of Confinement

At the disposition hearing, minor was declared a ward of the court, placed on probation, and released to the custody of his parents. Additionally, the court declared the maximum term of confinement at five years eight months. On appeal, minor contends—and the People agree—that the court was not authorized to set the maximum term of confinement because minor was released to the custody of his parents. (Welf. & Inst. Code, § 726, subd. (c).) We agree with the parties.

Welfare and Institutions Code section 726, subdivision (c), provides that when a minor is removed from the physical custody of his parent or custodian as a result of criminal violations sustained under Welfare and Institutions Code section 602, "the order shall specify that the minor may not be held in physical confinement for a period in excess of the maximum term of imprisonment which could be imposed upon an adult convicted of the offense . . . ." (Welf. & Inst. Code, § 726, subd. (c).) Here, minor was not removed from the physical custody of his parents but was placed on home probation. The statute does not authorize the juvenile court to specify a maximum term of confinement unless the minor is removed from physical custody of his parents. (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 541.) The maximum term of confinement, therefore, should be stricken from the court's minute order. (*Ibid.*)

B. The Probation Condition

Minor contends that a probation condition term, which requires that minor "[n]ot associate with anyone who has possession of weapons of any kind, including but not limited to: firearms, firearm facsimile, nunchakus, martial arts weaponry, and knives[,]" is unconstitutionally vague and overbroad. The People agree that the probation condition must contain a knowledge requirement. We agree.

Trial courts have broad discretion to set conditions of probation in order "to foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120; see also Pen. Code, § 1203.1, subd. (j).) "If it serves these dual purposes, a probation condition may impinge upon a constitutional right otherwise enjoyed by the probationer, who is 'not entitled to the same degree of constitutional protection as other citizens.' [Citation.]" (*People v. Lopez* (1998) 66 Cal.App.4th 615, 624 (*Lopez*).) However, that discretion is not boundless. (*People v. Garcia* (1993) 19 Cal.App.4th 97, 101 (*Garcia*).) "[C]onditions of probation that impinge on constitutional rights must be tailored carefully and 'reasonably related to the compelling state interest in reformation and rehabilitation . . . .' [Citation.]" (*People v. Delvalle* (1994) 26 Cal.App.4th 869, 879.)

"[T]he void for vagueness doctrine applies to conditions of probation." (*People v. Reinertson* (1986) 178 Cal.App.3d 320, 324.) A vagueness challenge is based on the due process concept of fair warning. (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) Therefore, a probation condition "'must be sufficiently precise for the probationer to

know what is required of him, and for the court to determine whether the condition has been violated.'" (*Ibid*.) Similarly, "[a] probation condition is constitutionally overbroad when it substantially limits a person's rights and those limitations are not closely tailored to the purpose of the condition." (*People v. Harrisson* (2005) 134 Cal.App.4th 637, 641, citing *In re White* (1979) 97 Cal.App.3d 141, 146 ["'The Constitution, the statute, all case law, demand and authorize only "reasonable" conditions, not just conditions "reasonably related" to the crime committed.' [Citation.] [¶] Careful scrutiny of an unusual and severe probation condition is appropriate."].) Hence, probation conditions are overbroad if they prohibit the defendant from associating with persons other than those targeted by the restriction. (*Lopez*, *supra*, 66 Cal.App.4th at pp. 628-629 [probation condition must contain element of knowledge of gang membership].)

In 2007, the California Supreme Court determined that a probation condition requiring that the juvenile defendant "not associate with anyone 'disapproved of by probation'" was unconstitutionally vague and overbroad "in the absence of an express requirement of knowledge . . . ." (*In re Sheena K.*, *supra*, 40 Cal.4th at pp. 890-891.) This was because the condition itself did not notify the defendant in advance with whom she was prohibited from associating, nor did it require that the probation officer communicate such information to her. (*Id*. at pp. 891-892.) Thus, the probation condition gave the probation officer the power virtually to preclude the defendant's association with anyone (*id*. at p. 890), which could theoretically include grocery clerks, mail carriers, and health care providers. The Supreme Court reasoned that "the

underpinning of a vagueness challenge is the due process concept of 'fair warning.'" (*Ibid*.) "The vagueness doctrine bars enforcement of '"a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." [Citation.]' [Citation.]" (*Ibid*.) Modification of the probation condition to require that the defendant have knowledge of who was disapproved of by her probation officer cured the infringement of the defendant's constitutional rights. (*Id.* at p. 892.)

In *Garcia*, the court held that a probationary term requiring the defendant not associate with users and sellers of narcotics, felons, or ex-felons was constitutionally overbroad in failing to recognize that the defendant may, inadvertently, socialize with individuals unknown to him to fall within such categories. (*Garcia*, *supra*, 19 Cal.App.4th at p. 102.) Likewise, the court found an implicit recognition of the knowledge requirement within the condition incompatible with constitutional goals: "the rule that probation conditions that implicate constitutional rights must be narrowly drawn, and the importance of constitutional rights, lead us to the conclusion that this factor should not be left to implication." (*Ibid*.) Hence, it explicitly modified the defendant's condition to prohibit him from associating with persons he knew to be users or sellers of narcotics, felons, or ex-felons. (*Id*. at p. 103.)

In *Lopez*, the defendant's probationary term No. 15 barred him from any gang association, involvement in gang activities, display of any gang markings, or wearing of gang clothing. (*Lopez*, *supra*, 66 Cal.App.4th at p. 622.) That court found the term

constitutionally vague and overbroad in that it failed to put the defendant on proper notice with whom he was prohibited from associating, what he could wear, and what activities in which he might lawfully engage. (*Id*. at pp. 628-631.) That court found an implied requirement of knowledge on the part of the defendant insufficient to overcome the constitutional infirmities: "Without at least the insertion in this aspect of the condition of a knowledge element, [the defendant] was subject to being charged with an unwitting violation of the condition because nothing in it required the police or the probation office to apprise [the defendant] of the 'identified' items of gang dress before he was charged with a violation." (*Id*. at p. 634.) Hence, the court modified the defendant's conditions of probation to require that the defendant not associate with anyone known by him to be a gang member and not wear clothing known by him to be gang attire. (*Id*. at p. 638.) With these minor modifications, the court found the defendant's probationary terms passed constitutional muster. (*Ibid*.)

The obvious jurisprudential trend is toward requiring that a term or condition of probation *explicitly* require *knowledge* on the part of the probationer that he or she is in violation of the term in order for it to withstand a challenge for constitutional vagueness. Even the People acknowledge that the probationary condition should be modified to include a specific knowledge requirement. Therefore, we shall order that minor's probation condition term discussed above be so modified.

C. Weapons Possession Offenses

In the petition filed against minor, the crimes of possession of a firearm (Pen. Code, § 12101, subd. (a)), and possession of a sharpened screwdriver on school property (Pen. Code, § 626.10, subd. (a)) were alleged as felonies. Following the contested adjudication, the juvenile court made a true finding as to each count and stated that each was a felony. A violation of Penal Code section 12101, subdivision (a) or Penal Code section 626.10, subdivision (a) is a "wobbler," punishable either as a felony or a misdemeanor. (Pen. Code, § 17, subd. (b).)

Minor contends the juvenile court failed to expressly state whether it was exercising its discretion in declaring each of the weapons possession offenses as either a felony or misdemeanor, and therefore, that the matter must be remanded. The People concede the issue. We agree.

Welfare and Institutions Code section 702 mandates that "[i]f the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony." The language of Welfare and Institutions Code section 702 "is unambiguous. It requires an explicit declaration by the juvenile court whether an offense would be a felony or misdemeanor in the case of an adult." (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1204 (*Manzy W.*).) "[Welfare and Institutions Code] section 702 means what it says and mandates the juvenile court to declare the offense a felony or misdemeanor." (*In re Kenneth H.* (1983) 33 Cal.3d 616, 619; see also *In re Ricky H.*

(1981) 30 Cal.3d 176, 191.) "[T]he purpose of the statute is not solely administrative. As *Kenneth H*. and *Ricky H*. acknowledge, the requirement that the juvenile court declare whether a so-called 'wobbler' offense was a misdemeanor or felony also serves the purpose of ensuring that the juvenile court is aware of, and actually exercises, its discretion under Welfare and Institutions Code section 702." (*Manzy W*., at p. 1207.) Furthermore, "neither the pleading, the minute order, nor the setting of a felony-level period of physical confinement may substitute for a declaration by the juvenile court as to whether an offense is a misdemeanor or felony. [Citation.]" (*Id*. at p. 1208.)

Here, while the court referred to the offenses as felonies in finding the allegations against minor true, nothing in this record demonstrates that the juvenile court was aware of its discretion to impose sentence for the offenses as misdemeanors rather than as felonies. The court appears to have referred to the offenses as felonies simply because the People alleged them as felonies. Therefore, the matter must be remanded for the juvenile court to comply with Welfare and Institutions Code section 702. (*Manzy W*., *supra*, 14 Cal.4th at p. 1211.)

III

DISPOSITION

The matter is remanded to the juvenile court (1) for an express declaration, in exercise of its discretion, whether minor's commission of the allegations in counts 1 and 3, for weapons possession, should be deemed felonies or misdemeanors; (2) for the court to strike the maximum confinement term; and (3) for the court to modify the probation condition term discussed herein. In all other respects, the judgment is affirmed.

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/s/ McKinster
Acting P.J.

We concur:

/s/ Richli
J.

/s/ Miller
J.